APPENDIX

APPENDIX A.

Opinion.

In the
United States Court of Appeals
for the Seventh Circuit.

September Term, 1968—April Session, 1969.

No. 17301

United States of America,
Plaintiff-Appellee,

v.

Joseph Richard Wick,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

August 19, 1969.

Before Duffy, Senior Circuit Judge, Kerner, Circuit Judge, and Beamer, District Judge.[1]

Kerner, Circuit Judge. Defendant, Joseph Richard Wick, was indicted on three counts for violation of 18 U. S. C., § 472, uttering and possessing counterfeit obligations of the United States with intent to defraud. A jury found defendant guilty on all counts and defendant appeals.

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[1] Judge George N. Beamer is sitting by designation from the United States District Court for the Northern District of Indiana.

On August 11, 1966, defendant picked up Joseph Foley in a 1960 Dodge and drove to Edwardsville, Illinois. In Edwardsville, defendant and Foley went to a card shop. They bought some cards with a counterfeit ten dollar bill. Defendant then went to a clothing store and gave the owner a ten dollar bill for the purchase of a $1.00 pair of socks. The owner of the clothing store refused to accept the bill because he thought it was counterfeit. The owner of the store followed defendant to a 1960 Dodge where he saw defendant put a package in the car. Defendant was arrested at the car with Foley and a woman, Norine Greenberg. In towing the car to the police station an employee for the towing company found a box of counterfeit ten dollar bills in the glove compartment.

The woman at the card store and the owner of the clothing store identified the defendant as the one who gave them counterfeit ten dollar bills. At the police station defendant admitted that he knew Foley but denied knowing Norine Greenberg. Norine Greenberg later testified that she was defendant's sister.

Defendant attacks the testimony of Agent Allen who interviewed him at the police station because of the agent's failure to give defendant the proper warnings under *Miranda v. Arizona,* 384 U. S. 436 (1966). The agent testified:

> I advised him of the fact that he did not have to tell me anything; that anything he told me could possibly be used in Court against him; I advised him of the fact that he had a right to an attorney; I advised him of the fact that if he couldn't afford an attorney, the Government had provisions whereby they would appoint one for him; I advised him that if he chose to answer my questions, he could stop answering questions at any time. And I think that's complete, so far as the advice of the rights are concerned, I think I remember it all.

The Court in *Miranda* said that the defendant should be told "that anything said can and will be used against . . ." him. 384 U. S. at 469. We do not think that the defendant was prejudiced by the use of the words "could possibly be used. . . ." Since during the interrogation defendant refused to answer any questions regarding the counterfeit money, it is evident he understood the warnings.

During the trial Agent Colquhoun testified that at the interrogation he heard Agent Allen ask the defendant where he obtained the counterfeit notes and defendant refused to answer the question. This conversation also was briefly mentioned in the closing argument of the government attorney. Defendant claims that these statements violated his fifth amendment privilege against self-incrimination and that he was prejudiced. In *Miranda v. Arizona,* 384 U. S. 436, 468 n. 37 (1966), the Court extended *Griffin v. California,* 380 U. S. 609 (1965), and held that a defendant's refusal to answer questions at an interrogation could not be used at trial. We agree with defendant that it was error to introduce defendant's reliance on his fifth amendment privilege at the interrogation in the trial. However, we find that the error was harmless. The Court in *Chapman v. California,* 386 U. S. 18 (1967), held that for error to be harmless it must be "harmless beyond a reasonable doubt. . . ." 386 U. S. at 24. In Chapman the state's attorney commented extensively upon the defendants' refusal to testify and interwove their refusal into his entire argument to the jury. Here, the two statements, one by the witness and one by the government attorney, amidst the overwhelming evidence against the defendant including two positive identifications, could not have contributed to the jury's verdict, and we do not think that he was prejudiced. *Cf. Harrington v. California,* 395 U. S. 250 (June 2, 1969).

Defendant also alleges that it was prejudicial error to give the following instruction over his objection:

> A defendant has the absolute right not to testify, and the jury must not draw a presumption of guilt or any inference against the defendant because he did not testify.

In *Bruno v. United States,* 308 U. S. 287 (1939), the Court held that it was error to refuse defendant's request for the instruction. Courts have also held that it is not error for the district judge to give the instruction *sua sponte. United States v. Garguilo,* 310 F. 2d 249 (2d Cir. 1962); *Hanks v. United States,* 388 F. 2d 171 (10th Cir. 1968). There is no evidence that such an instruction has a prejudicial effect but rather it is thought to be helpful. *United States v. Garguilo,* 310 F. 2d at 252. Here, the instruction may have helped to cure any error created by the testimony of the agent and the comment of the government attorney. *United States v. Agueci,* 310 F. 2d 817, 831 (2d Cir. 1962). We do not think it was error to give the instruction in the face of defendant's objection. *United States v. Schwartz,* 398 F. 2d 464, 469-70 (7th Cir. 1968).

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

The testimony relative to the assignment of error appears at pages 153, 154, and 155 of the transcript is as follows:

[153] The Court: Now, when you say the two individuals——

The Witness: Mr. Foley and Mr. Wick.

Mr. Runge: Q. All right.

And were any questions asked of Mr. Wick at that time? A. Yes, they were, he was asked where he got these particular counterfeit notes, he was told that they were——

Q. Now, just—just a minute.

Mr. Shaw: Let me hear——

Mr. Runge: May we approach the bench, Your Honor?

Mr. Shaw: Well now, Your Honor, he's asked a question, now he's trying to cut him off from answering, I think that Runge ought to testify, Judge, then he'd know exactly——

The Court: Well now, there'll be no comment, if you've got anything you want to tell the Court, come up and tell the Court.

(Discussion off the record, at the bench, and outside the hearing of the jury.)

Mr. Runge: Would you read the question to the witness, please?

[154] (Whereupon the last question was read back.)

The Witness: Yes, they were, we asked Mr. Wick—we told——

Mr. Shaw: Just a second.

The Court: He's answering the question.

Mr. Shaw: As not responsive——

The Court: He answered the question, now ask another question.

Mr. Runge: Q. Do you remember, were any questions

asked and any answers given concerning anyone who might have been with him, for example?

Mr. Shaw: Now, just a second. Your Honor, again—and this isn't to be fictitious, if Mr. Runge wants to testify, he should, this is not a proper question, it is leading and suggestive, it is—it is highly prejudicial to the Defendant, and I'm going to ask that the jury be discharged and a mistrial declared, just on the basis of that question that was put to this witness.

The Court: Objection will be overruled.

Mr. Shaw: I'm going to object to it as leading and suggestive, Your Honor, and putting words in the witness's mouth.

The Court: Well, the question hasn't been answered. [155] Now, ask another question.

Mr. Runge: Q. Mr. Colquhoun, you've testified that there was questioning going on at that time? A. Yes.

Q. All right.

Do you recall any specific questions that were asked? A. Yes.

Q. Would you tell the Court and jury what those questions were and the answers, if you recall? A. He was asked where he obtained the counterfeit notes, and he refused to give an answer to that question.

Mr. Shaw: All right.

Now, if Your Honor please, I'm going to ask that the jury be discharged and a mistrial be declared.

The Court: Objection overruled. Proceed, gentlemen.

The Witness: He was also asked if he knew the other individual, a Mr. Foley, who was in the room, and he said he had picked up Mr. Foley on the Missouri side of the —hitchhiking on the Missouri side of the Veterans Bridge, which is just—on the Illinois side [sic] of the Veterans Bridge, just in East St. Louis, Illinois, he was asked if he knew the—if he knew Margaret Greenberg, who had been arrested at the same time, and he * * *

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The testimony relevant to the argument which appears at pages 221 and 222 of the transcript is as follows:

* * * * * * *

[221] them had a $5.00 bill and four singles in it, another had a $5.00 and one single in it, and another had a $5.00 bill or [sic] four singles in it, and another had the $5.00 bill and four singles in it, and one of the groupings had a $5.00 bill and five singles in it. That does not include the $9.00 that Mr. Renken got back when he got his socks back and his money. So, without Mr. Renken's money it added up to $43.00 in fives and singles, with Mr. Renken's $9.00, it adds up to $52.00. But, at the time that this Defendant gave Mr. Renken a counterfeit $10.00 bill, he had $43.00 in his pocket of lower and smaller denominations.

And prior to that he had given another $10.00 bill to Miss Nicol for some greeting cards at the Melody Bar.

And Mr. Renken told us that what he bought at his store was a pair of socks for a dollar, and he gave him the dollar [sic] and the tax, then he gave him $9.00 change.

Then Mr. Colquhoun took the stand, told us about being at the Police Station, and that he came in, actually, when Mr. Allen talked to Mr. Wick and they—he overheard—Mr. Allen asked the questions and Mr. Wick give some answers, and specifically that when he [222] asked him about any counterfeit, Mr. Wick said he didn't want to answer.

Mr. Shaw: If the Court please, I'm going to ask the jury be discharged and a mistrial declared for that comment of the State's—of the Government attorney.

The Court: Overruled.

Mr. Runge: And at that point he followed Mr. Allen out of the Police Station, Mr. Allen got in the car, drove it * * *.